M E M O R A N D U M

TO: The Justices
cc: Corbin Davis, Michael Schmedlen, Danilo Anselmo, and Carl Gromek

FROM: Justice Elizabeth A. Weaver

SUBJECT: Dissenting Statement to Michigan Supreme Court Majority Decision Authorizing the SCAO to Release the Judicial Resources Recommendations Report to the Legislature

DATE: July 31, 2007

This morning, I read to Clerk of the Court Corbin Davis an email Justice Kelly wrote me today stating that she was joining Justices Cavanagh and Weaver's dissenting statements, and further stating that she spoke with State Court Administrator Carl Gromek, who then consulted with Chief Justice Taylor. Carl Gromek indicated that the State Court Administrative Office would not include Justices Cavanagh and Weaver's dissenting statements with their transmittal to the Legislature and that Justices Cavanagh, Weaver, and Kelly could ask Clerk Davis to send the statements out. Clerk Davis said that he would promptly send Justices Cavanagh and Weaver's dissenting statements to the same addressees to which the SCAO Judicial Resources Recommendations Report is being sent.

Early this afternoon, Clerk Davis called me and informed that Chief Justice Taylor, by telephone call from Legal Counsel Michael Gadola, ordered Clerk Davis not

to send our dissenting statements, but to retain them in the Clerk's office for purposes of the minutes.

Below is my dissenting statement.

WEAVER, J., (*dissenting*). I wholly join in Justice Cavanagh's dissent to the Michigan Supreme Court majority of four's (Chief Justice Taylor, and Justices Corrigan, Young, and Markman) decision authorizing the State Court Administrative Office (SCAO) to release the Judicial Resources Recommendations Report (JRR report) to the Legislature.[1]

Further, I write separately to state that the manner in which the majority of four has mishandled the situation is disorderly, unprofessional, and unfair to the other justices; the counties, courts, and the judges affected by the JRR report; the Legislature; and the people of Michigan. Serious concerns have been raised regarding the validity, value, accuracy, and adequacy of the JRR report. These concerns have not been answered, nor has due deliberation and careful consideration been given to this report before releasing it to the Legislature.

At the July 25, 2007 administrative conference of the Michigan Supreme Court, the majority of four voted to authorize the SCAO to release the JRR report dated July 13, 2007 to the Legislature in spite of the fact that the recommendations made in the report

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[1] The 57 page 2007 JRR report provides statistical and qualitative analysis regarding recommendations for additions or reductions in judgeships. The report recommends that fifteen trial court judges and four Court of Appeals judges be eliminated through attrition.

were not recommended by the Supreme Court. I dissent to the majority's decision because:

(1) the SCAO does not have the constitutional authority to make a recommendation to the Legislature;

(2) the report, as it stands, is inadequate and incomplete and;

(3) the decision to send the report to the Legislature has been unnecessarily and hurriedly adopted without careful consideration and due deliberation.

I. Background—How the Majority of Four's Hurried Decision Was Reached

How the majority of four's hurried decision was reached illustrates the continued misuse of power and unfair conduct of the Court's business by the majority of four.[2]

Here is a timeline of events showing what occurred:

- July 13, 2007—The Judicial Resources Recommendation report was circulated by the Deputy Supreme Court Counsel/Assistant to the SCAO General Counsel, to the justices.

- July 13, 2007—The Supreme Court Chief of Staff/State Court Administrator, Carl Gromek, circulated a memo to the Chief Judge of the Court of Appeals, Chief Judge William C. Whitbeck. The memo was attached to Section II of the JRR report, the section concerning Court of Appeal judges. Carl Gromek's memo advised Chief Judge Whitbeck that the JRR report was to be "considered" at the upcoming Supreme Court administrative conference on July 25, 2007.

- July 16, 2007—Chief Judge Whitbeck sent a letter to the Supreme Court requesting that Carl Gromek attend the upcoming special July 20, 2007 Court of Appeals judges' meeting to discuss the JRR report. Chief Judge Whitbeck also

[2] Chief Justice Taylor's actions leading up to the release of the report by the SCAO are detailed at page one, under the section titled "Brief History" of the position statement of the Court of Appeals, attached hereto as Appendix A.

requested that he be invited to attend the upcoming July 25, 2007 Supreme Court administrative conference.

- July 17, 2007—In response to Chief Judge Whitbeck's request, Chief Justice Taylor, without first consulting all of the justices on the Court, indicated by email that Chief Judge Whitbeck's presence would not be required at the administrative conference, but that he would be consulted if there were questions.[3] Chief Justice Taylor would not invite Chief Judge Whitbeck to the administrative conference.

- July 18, 2007—Chief Judge Whitbeck indicated he would be available at any time on the 25th to answer questions and he renewed his request that he be allowed to attend the administrative conference.

- July 18, 2007—Justice Weaver during the Court's regularly scheduled conference requested that Chief Judge Whitbeck be invited to the Court's July 25, 2007 administrative conference and that State Court Administrator, Carl Gromek, meet with the Court of Appeals judges before the July 25, 2007 conference.

- July 19, 2007—Chief Justice Taylor denied Chief Judge Whitbeck's renewed request. Chief Justice Taylor explained that Carl Gromek would be briefing the Court regarding the contents of the JRR report and that the justices were not planning to vote on, or amend, the recommendations made in the report.

- July 23, 2007—After again being denied the opportunity to attend the administrative conference, Chief Judge Whitbeck submitted a Court of Appeals majority position statement (which included Chief Judge Whitbeck's analysis of the SCAO report) to the Court. (Attached as Appendix A.)

- July 25, 2007
  The justices met for an administrative conference to discuss the Judicial Resources Recommendation report. After considerable discussion and objection to the majority's relentless rush to have the report released without careful consideration and due deliberation, Justice Weaver made a motion:

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[3] In addition, Carl Gromek sent an email dated July 16, 2007 to Chief Judge Whitbeck indicating that he would be out of town and therefore unable to attend the special Court of Appeals meeting. Chief Justice Taylor later indicated that Carl Gromek could be available by phone if needed.

> That Carl Gromek, the State Court Administrator/Supreme Court Chief of Staff, answer, in writing, all of the objections raised in the Court of Appeals majority position statement and Chief Judge Whitbeck's analysis of the report, excluding the constitutional challenge issue. Further, that no report be issued by this Court or the SCAO until all of the objections have been answered and this Court has had an opportunity to thoroughly review and discuss the findings.

The motion was seconded and put to a vote, but was defeated by the majority of four, by a 4 to 3 vote.

Thereafter, Justice Young made a motion to:

> Allow the State Court Administrator to submit the Judicial Resources Recommendation report to the Legislature without any Supreme Court recommendation as to any of the report's conclusions, but reserving the right of the Court to make a future recommendation.

Justice Weaver suggested a friendly amendment to Justice Young's motion to include the Court of Appeals majority position statement (including Chief Judge Whitbeck's analysis) along with the JRR report to be submitted by the SCAO to the Legislature. Justice Young repudiated the friendly amendment. Justice Young's motion was seconded and passed by a 4 to 3 vote, with Justices Cavanagh, Weaver and Kelly dissenting.[4]

As a result of Justice Young's refusal of the friendly amendment, the majority chose to provide the Legislature with less information, rather than more.

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[4] The dissenting justices were granted less than one week (July 31, 2007) to thoroughly review the 57 page JRR report and to prepare dissenting statements.

II. The Majority's Delegation of Power to the SCAO is Unconstitutional

The majority of four deceptively and cleverly crafted its decision such that it allows the SCAO to release the JRR report to the Legislature while reserving possible Supreme Court recommendation of the report to a future date. This maneuvering is an attempt by the majority to make it appear that the majority is not recommending the JRR report. It is a thinly veiled attempt by the majority of four to make a precipitous recommendation without actually acknowledging that it has done so and without taking responsibility for it.

The action taken by the majority of four was unconstitutional because the SCAO does not have the authority to make recommendations to the Legislature regarding the elimination or addition of judgeships. The JRR report cites Michigan Constitution Article 6, §§ 3 and 11 as the authority to make the JRR report.[5] Neither of these provisions support the majority's decision to allow the SCAO to unilaterally make recommendations to the Legislature.[6]

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[5] Judicial Resources Recommendations Report p 3 n 1.

[6] Article 6, § 3 of the Michigan Constitution outlines the authority of the State Court Administrator and states in pertinent part:

> The supreme court shall appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state. The administrator shall perform administrative duties assigned by the court.

Nothing in Article 6, § 3 authorizes the state court administrator to make recommendations to the Legislature independently of the Supreme Court because the state court administrator can only act as an administrative arm of the Supreme Court and "perform administrative duties assigned by the court." While the majority of four may

Footnotes continued on following page.

Under Michigan Constitution Article 6, § 11, no report can be submitted to the Legislature without it first being decided as a recommendation of the Supreme Court. Only the Michigan Supreme Court has constitutional authority to recommend changes to the Legislature. Consequently, because the majority's decision allows the release of the SCAO Judicial Resources Recommendations report without that report being presented to the Legislature as a "recommendation of the supreme court," the submission of the JRR report is unconstitutional.

III. Incompleteness and Inadequacy of the JRR Report as Circulated

As summarized in the Court of Appeals majority position statement (Appendix A), the Judicial Resources Recommendations Report is incomplete and inadequate because the SCAO never relates the judicial workload data for the Court of Appeals to the recommendations made in the JRR report.

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argue that authorizing the state court administrator to release the JRR report to the Legislature was simply an "administrative duty assigned by the court," any such assertion is incorrect. Only the justices of the Supreme Court have the constitutional authority to make recommendations to the Legislature regarding the number of judgeships.

Article 6, § 11 of the Michigan Constitution states in pertinent part:

> The number of judges may be changed and circuits may be created, altered and discontinued by law and the number of judges shall be changed and circuits shall be created, altered and discontinued on recommendation of the supreme court to reflect changes in judicial activity. [Emphasis added.]

In addition, the JRR report neglects to address the serious dilemma that would result if four Court of Appeal judges were to be replaced by young and inexperienced pre-hearing research attorneys fresh out of law school. As Chief Judge Whitbeck states,

> Judges at the Court of Appeals are appointed or elected to carry out the responsibilities of their offices. When taken to their ultimate absurdity, the recommendations of the SCAO Report would result in a smaller number of Judges at the Court of Appeals functioning simply as appendages of the Research Division.

The JRR report neither answers these questions, nor discusses the ramifications of the changes it has recommended.

Incredibly, the SCAO failed to consult with Chief Judge Whitbeck and the Court of Appeals judges before making any of its recommendations.

It is premature for this Court to authorize the submission of the JRR report to the Legislature before these issues are thoroughly and carefully investigated, discussed and decided. This Court simply does not have enough information to make an informed decision about whether to submit the Judicial Resources Recommendations Report to the Legislature.

The majority of four has voted to permit the submission of the JRR report to the Legislature before there has been sufficient analysis and investigation supporting the report's findings. The majority's actions are a hurried attempt to de facto submit a recommendation to the Legislature regarding the elimination of judgeships. By passing this recommendation off as an "SCAO recommendation" the majority has, for now, dodged taking responsibility for releasing the JRR report to the Legislature.

The majority of four's attempt to imply that the SCAO and the Michigan Supreme Court are two independent bodies in the matter of judicial recommendations is false and deceptive. The Michigan Court Rule delineating and authorizing the powers of the SCAO states that the SCAO operates "under the Supreme Court's supervision and direction." MCR 8.103. Clearly, the SCAO is part and parcel of the Michigan Supreme Court in the matter of judicial recommendations. Notably, the current State Court Administrator is concurrently the *Michigan Supreme Court* Chief of Staff. The SCAO General Counsel is also the Legal Counsel to the *Michigan Supreme Court* and the Deputy Legal Counsel to the *Michigan Supreme Court* also assists the SCAO General Counsel.

The commingling of these positions erases any lines of distinction between the State Court Administrative Office and the Michigan Supreme Court in this matter concerning recommendations of judgeships. As a result, any recommendation made by the SCAO to the Legislature should be perceived as a recommendation made by the Michigan Supreme Court. However, only the recommendations on which the Supreme Court justices have deliberated and voted are constitutionally permitted. Because the JRR report submitted by the SCAO to the Legislature was never voted on as a recommendation by the Supreme Court, it is incorrect and unconstitutional to submit the report to the Legislature.

IV. Decision to Send JRR Report to Legislature is Hurried

As stated earlier, the justices were allowed only 12 days to review and analyze the 57 page Judicial Resources Recommendations report. Moreover, the report was provided on July 13, 2007, just prior to the July 25, 2007 deadline by which the Court was to have completed all of the remaining cases for the 2006-2007 term. The justices were already diligently working to meet this deadline. There was insufficient time in which to study the lengthy report and to decide whether to recommend its findings to the Legislature.

Because Chief Justice Taylor's email of July 19, 2007 indicated that a vote would not be taken concerning the recommendations made in the report, notice was not provided to the justices that dispositive action would in fact be taken during the July 25, 2007 administrative conference. Furthermore, without first consulting with the other justices on the Court, Chief Justice Taylor and the State Court Administrator established a manufactured deadline of August 1, 2007 as the date by which the JRR report was to be released to the Legislature. No notice was provided to all the justices that any release date had been considered or established.

The majority has not provided any reason to rush this matter without prior careful consideration and due deliberation. In fact, none of the recommendations listed in the JRR report would take effect for a year and a half (January of 2009)! Given the complete absence of any exigent circumstances, the majority's relentless efforts to hastily release the JRR report to the Legislature is objectionable.

The manner in which the majority has mishandled this situation is disorderly, unprofessional and unfair to the other justices; the counties, courts, and judges affected

by the JRR report; the Legislature; and the people of Michigan. The majority in fact declined to consider the comments offered by Chief Judge Whitbeck and the Court of Appeals judges and the State Court Administrator failed to meet with Chief Judge Whitbeck and the Court of Appeal judges. Further, the majority did not permit Chief Judge Whitbeck to even speak to the Court regarding the eliminations recommended by the JRR report. The majority's relentless and rash action represents an abuse and misuse of power and undermines any value of the JRR report, and the integrity of the Michigan Supreme Court.

V. Conclusion

I dissent to the Michigan Supreme Court majority's decision authorizing the State Court Administrative Office to release the Judicial Resources Recommendations Report to the Legislature because the SCAO does not have constitutional authority to make a recommendation to the Legislature, the report, as it stands, is inadequate and incomplete, and the decision to send the report to the Legislature has been unnecessarily hurried.

Serious concerns have been raised regarding the validity, value, accuracy, and adequacy of the Judicial Resources Recommendations Report. These concerns have not been answered, nor has due deliberation and careful consideration been given to this report before releasing it to the Legislature.

CAVANAGH and KELLY, JJ. We join the statement of Justice Weaver.

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM C. WHITBECK
CHIEF JUDGE

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July 23, 2007

The Honorable Clifford W. Taylor
Chief Justice, Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa Street
P.O. Box 30052
Lansing, MI 48909

Dear Chief Justice Taylor:

Attached are the position statement of the Court of Appeals relating to the July 13, 2007 SCAO Report and an analysis of that Report. In light of these materials, I urge the Supreme Court not endorse, accept, receive, or release the SCAO Report as it relates to the Court of Appeals. I am particularly concerned over the damage that the SCAO Report will do to the Court of Appeals in the FY 2008 budget cycle.

As you know, I will be in my office in the Hall of Justice in Lansing all day on Wednesday and will be available to the Justices of the Supreme Court at any time to respond to questions concerning the position statement of the Court of Appeals, the analysis, or the SCAO Report itself. I may find it difficult to respond to a presentation on the SCAO report itself if I have not heard that presentation, but I leave that matter to the sound discretion of the Court.

Thank you for your consideration of these requests.

Sincerely,

William C. Whitbeck
Chief Judge

Attachments
cc: Justices of the Supreme Court
Judges of the Court of Appeals
Carl Gromek
Sandra Mengel
Larry Royster

POSITION STATEMENT OF THE MICHIGAN COURT OF APPEALS
SCAO REPORT OF JULY 13, 2007

At a special Judges' meeting held on July 20, 2007, the Michigan Court of Appeals adopted the following position statement concerning the section of the July 13, 2007 report of the State Court Administrative Office detailing the 2007 Judicial Resources Recommendations for the Court of Appeals (the "SCAO Report").

I. Brief History

Several months ago, Chief Justice Taylor publicly stated his view that, because of a declining workload at the Court of Appeals, four judgeships at the Court should be eliminated. Chief Justice Taylor also said that he would ask the SCAO to study this situation and make recommendations as part of its 2007 Judicial Resources Recommendations. Chief Justice Taylor later asked Governor Granholm not to fill upcoming vacancies on the Court until that report is issued. The SCAO has now issued its recommendations as to the Court of Appeals.[1]

The SCAO Report recommends the elimination of four judgeships at the Court of Appeals, precisely in line with the Chief Justice's prior public comments. However, the SCAO Report makes few references to the declining number of filings at the Court of Appeals over the last ten years and does not posit this decline as in any way related to its recommendations. Rather, it bases it recommendations upon the notion that if four judgeships were to be eliminated, approximately $1,434,088 in personnel costs could be saved annually.[2] From these "savings," approximately $770,000 would be used to hire 11 additional pre-hearing attorneys in the Research Division of the Court of Appeals.[3] The rest of the "savings," approximately $664,088, would somehow be used to "save taxpayer dollars."[4]

II. Constitutional Issues

Article 6 of the 1963 Michigan Constitution[5] created the Court of Appeals and Chapter 3 of the Revised Judicature Act[6] and the Michigan Court Rules[7] govern its operations. The Legislature has increased the number of Judges on the Court of Appeals four times.[8]

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[1] The Judges of the Court of Appeals have neither received nor reviewed the balance of the 2007 Judicial Resources Recommendations, which presumably covers trial courts. The Judges, therefore, offer no opinion or statement of position concerning any such recommendations.

[2] SCAO Report, p 56.

[3] SCAO Report, p 56.

[4] SCAO Report, p 57.

[5] Const 1963, art 6.

[6] MCL 600.301, *et seq*.

[7] MCR 7.200, *et seq*.

[8] See 1968 PA 127, increasing the number of Judges from 9 to 12; 1974 PA 144, increasing the number of Judges from 12 to 18; 1986 PA 279, increasing the number of Judges from 18 to 24; and 1993 PA 190, increasing the number of Judges from 24 to 28.

With respect to the process for increasing the number of Judges on the Court of Appeals, the 1963 Constitution contains the following provision:

> The court of appeals shall consist initially of nine judges who shall be nominated and elected at nonpartisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law. The supreme court may prescribe by rule that the court of appeals sit in divisions and for the terms of the court and the times and places thereof. Each division shall consist of not fewer than three judges. *The number of judges comprising the court of appeals may be increased, and the districts from which they are elected may be changed by law.* [9]

As noted, the Legislature has increased, but never decreased, the number of Judges on the Court of Appeals. Given the literal language of the Constitution, which only authorizes *increases* in the number of Judges, it is questionable whether the Legislature has the authority to provide for a decrease.[10]

It might be argued that this is an absurd result, since such an interpretation would deprive the Legislature of the ability to adjust the number of Judges on the Court of Appeals downward in response to workload fluctuations. But in *Twp of Casco v Secretary of State*[11] and *People v McIntire*[12] the Supreme Court has rejected the absurd results "rule."

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[9] Const 1963, art 6, § 8 (emphasis supplied).

[10] See the comments of Robert J. Danhof, Chairman of the Judicial Branch Committee (and later Judge and then Chief Judge of the Court of Appeals): "The last sentence is self explanatory. If the work load becomes such that more judges are need, the legislature may by law *increase* the number of judges." 1 Official Record, Constitutional Convention 1961, p 1604 (Emphasis supplied). Later, while discussing a scheduling provision to "get the court operating[,]" Mr. Danhof stated, "Should the legislature see fit to *increase* the number of judges, they could fit them into the rotation as needed." *Id.*, pp 1604-1605 (emphasis supplied). But see the comment of delegate Boothby when proposing an amendment to Committee Proposal 92a that the "court could be enlarged or *lessened* according to the decision of the legislative body." *Id.*, p 1613 (emphasis supplied). Nevertheless, Committee Proposal 92a was referred to the Committee on Style and Drafting containing the *increased* language with no reference to a *decrease*; that Committee retained the *increased* language as did the Constitution that the Constitutional Convention and the voters adopted.

[11] *Twp of Casco v Secretary of State*, 472 Mich 566, 603; 701 NW2d 102 (2005). The Court stated:

> "[I]n *People v McIntire*, this Court rejected the absurd results 'rule' of construction, noting that its invocation is usually 'an invitation to judicial lawmaking. It is not the role of this Court to rewrite the law so that its resulting policy is more 'logical,' or perhaps palatable to a particular party or the Court. It is our constitutional role to give effect to the intent of the Legislature by enforcing the statute as written. What defendants in these cases (or any other case) may view as 'absurd' reflects an actual policy choice adopted by the majority of the Legislature and approved by the Governor. If defendants prefer an alternative policy choice, the proper forum is the Legislature, not this Court." [Internal footnotes omitted].

[12] *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).

Thus, while the Supreme Court might believe that it is illogical, or even absurd, to conclude that the Constitution does not authorize the Legislature to decrease the number of Judges on the Court of Appeals, it is not the role of the Supreme Court to rewrite the Constitution to make it more "logical" or more palatable to the Court.

In any event, there is a strong argument that the drafters of the Constitution and the voters who approved it intended to provide for *increases*, and not *decreases*, in the number of Judges on the Court of Appeals. It is certainly plausible that the drafters wished to guard against legislative action to decrease the number of Judges in response to a decision, or series of decisions, that the Legislature deemed to be unfavorable. Such a position would protect and preserve the independence of the judicial branch and safeguard its integrity.

Further, this situation presents the Supreme Court with a serious dilemma. The Supreme Court has traditionally been reticent about supporting or opposing legislation on the ground that the constitutionality of such legislation might come before the Court in subsequent litigation. (We assume that the Chief Justice and the SCAO would agree that a reduction in the number of Judges on the Court of Appeals can only be accomplished by legislative action). Here, the Chief Justice and the SCAO would of necessity be viewed as strong proponents of legislation to decrease the number of Judges on the Court of Appeals. Given the language of the Constitution, it is possible, if not probable, that there would be a court challenge to such legislation. How then would the Supreme Court respond to a challenge to such legislation, given the heavy involvement of the Chief Justice and the SCAO in its formulation?

III. "Balance"

According to the SCAO Report, eliminating four judgeships at the Court of Appeals would "restore balance to the COA and allow for more efficient use of resources."[13] The SCAO Report never defines or further explains the term "balance" nor does it outline why its proposals would be more "efficient" within the context of the operations of the Court of Appeals. The reason that the SCAO Report has not dealt with the rationale behind its selection of *four* judgeships for elimination—and therefore its proposal to use roughly half the "savings" to hire 11 additional pre-hearing attorneys—is that it has never grappled at all with the central question: *at an intermediate appellate court with a centralized research staff, what is the optimum ratio between the lawyers on that staff and the lawyers, including Judges, in the Judicial Chambers*?

Presumably, when the SCAO Report refers to "balance" at the Court of Appeals, it is referring to this ratio. But there is not the slightest evidence that SCAO has even considered this question. Rather, it simply refers to restoring the proper balance to the court,[14] states that the Court has historically "struggled to achieve the proper balance

[13] SCAO Report, p 56.

[14] SCAO Report, p 49.

between judges and staff,"[15] and opines that "a proper balance of judges and staff will maximize efficiency."[16]

IV. Implementation

The SCAO Report give no indication of how its proposals would be implemented, other than to indicate that the reduction of Judges would occur through "attrition."[17]

V. Workload

The SCAO Report makes no attempt to explain why the elimination of four Judges should take place during a time when the workload *per Judge* at the Court of Appeals is increasing, both in terms of filings and dispositions. Indeed, the SCAO report cites workload data but makes no attempt to relate these data to its recommendations.

VI. Conclusion

The SCAO Report never addresses whether legislation decreasing the number of Judges on the Court of Appeals is in fact constitutionally possible. It never addresses the hard question of what the proper balance between the lawyers on the central research staff and the lawyers in the Judicial Chambers actually is. It never addresses the method of implementation other than to refer to "attrition." It never attempts to relate workload data to its recommendations.

We are gratified that the SCAO has now recognized the need for additional attorneys in the Research Division of the Court of Appeals. We note that the Court of Appeals has, in its annual budget presentations to the Legislature, for years been making the case for increasing the staff in that Division. However, given the considerable short and long-term implications of the SCAO's recommendation for the elimination of four judgeships at the Court of Appeals and the serious flaws in the analysis that underlies that recommendation, we oppose that recommendation and urge the Supreme Court not to adopt it. Attached is an analysis that Chief Judge Whitbeck has prepared reviewing the SCAO Report in greater detail.

[15] SCAO Report, p 50.

[16] SCAO Report, p 50.

[17] SCAO Report, p 57.

ANALYSIS OF THE SCAO REPORT

By: William C. Whitbeck
Chief Judge, Michigan Court of Appeals

I. Opinion Cases

After a brief introduction, the SCAO Report turns to a discussion of opinion cases.[1] For the most part, this discussion is both accurate and unremarkable for the reason that it draws heavily, although without attribution, upon the publicly available initial report and subsequent progress report of the Court of Appeals with respect to its delay reduction program.

The discussion does, however, contain a closing paragraph that is freighted with meaning:

> The bulk of the work required to process a case through the COA is performed by staff. This is not to minimize the judges' efforts or ultimate responsibility in deciding cases, but to point out that a proper balance of judges and staff will maximize efficiency.[2]

The SCAO makes no attempt to define "proper balance" between Judges and staff attorneys. But this sentence does glance off a very hard question: *to what extent in the process of reaching judicial decisions and articulating the reasons for those decisions should the Judges of the Court of Appeals rely on the analyses and proposed opinion language that attorneys in the Research Division provide?* The SCAO's answer, although not stated directly, is that the Judges should rely on these analyses and proposed opinion language to a greater extent than they do now.

II. The Last 20 Years

The SCAO Report next discusses the last 20 years of the Court's operations. With one exception, this discussion is also accurate and fairly straightforward. The exception relates to the summary chart.[3] Here, the SCAO acknowledges, for the first and only time, the Court of Appeals' use of visiting Judges. This is significant both for what it says and what it does not say. The SCAO, by the use of the phrase "Annual Equivalent Visiting Judges," has apparently conceded both that the Court Of Appeals used such Judges extensively during the 1990s and that such Judges were the equivalents of the elected Judges of the Court of Appeals.

This is exactly contrary to the position of the Chief Justice on this point. The Chief Justice posited his argument for a reduction in the number of Judges at the Court of Appeals upon the decline in the number of filings (as the summary chart[4] illustrates, the filings with the Court peaked in 1992 at 13,352 and declined to a low of 7,102 in 2001). When it was pointed out that

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[1] SCAO Report, pp 49-50.

[2] SCAO Report, p 50.

[3] SCAO Report, p 51.

[4] SCAO Report, p 51.

the Court used a number of visiting Judges during that period but has not used such Judges in recent years—thus adjusting the number of Judges to the Court of Appeals' workload—the Chief Justice replied that visiting Judges were not equivalent to Court of Appeals Judges. Indeed, the Supreme Court's public information officer at one point made the statement that no visiting Judge had writing responsibility.[5] Obviously, on this point, the SCAO does not agree. In part this may stem from the fact that the SCAO had the responsibility of authorizing the use of visiting Judges.

What the SCAO Report does not address at all is the workload *per Judge* at the Court of Appeals. As the chart below indicates, the workload per Judge, both in terms of filings and dispositions, has increased in recent years.

	1996	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Filings	9,108	8,866	8,264	7,731	7,460	7,102	7,156	7,445	7,055	7,629	7,951
Total Judges	39.73	31.36	28.91	28.73	28.82	28.45	28.00	28.09	28.00	28.00	28.00
Dispositions per Judge	272.9	326.6	304.6	268.5	270.6	267.3	273.1	274.3	260.5	280.5	295.6
Filings per Judge	229.2	282.7	285.9	269.1	258.8	249.6	255.6	265.0	252.0	272.5	284.0

The reason for this omission is readily apparent: it is exceedingly difficult to argue that the number of Judges at the Court should be reduced at a time when the workload *per Judge* is increasing.

III. Correlation Coefficients

The SCAO Report includes a short section on correlation coefficients.[6] Its stated purpose is to support the contention that the Court of Appeals "can operate efficiently with fewer sitting judges."[7] To the layperson the statements made in this short section are virtually incomprehensible. Rather clearly, filings at the Court are positively correlated with dispositions. Indeed, the correlation is perfect: for every filing there will ultimately be a disposition. Therefore, filings *cause* dispositions. Similarly, as outlined above, there is a positive correlation between filings and the use of visiting Judges: as filings decreased, so did the Court's use of visiting Judges. Thus, the decrease in filings *caused* the decrease in the use of visiting Judges, albeit with something of a lag in timing.

[5] This statement was inaccurate. Visiting Judges had writing responsibility approximately 20% of the time.

[6] SCAO Report, p 53.

[7] SCAO Report, p 53.

Other than these rather commonsense observations, there is nothing in this section that actually supports the contention that the Court can operate more efficiently with fewer sitting Judges. The section is simply window dressing, with little if any analytical value.

IV. Delay Reduction

A. *Overview*

It is in this equally short section[8] that the SCAO Report goes seriously awry. It notes, accurately, that by end of 2006 the Court of Appeals had reduced the time it took to decide an opinion from 653 days on average to 423 days on average. The SCAO Report labels this reduction as a "remarkable achievement." Indeed it is; no other court in the country has achieved such a reduction in delay on appeal. Further, with one exception,[9] the Court of Appeals achieved this level of success without any meaningful increase in the resources available to it.

The SCAO Report then goes on, however, to sound the death knell for delay reduction. It states that, "further delay reduction cannot continue within current and anticipated budgets."[10] As outlined below, this is not accurate. But it is vitally important to understand that the Court's delay reduction efforts are, in the analysis the SCAO has undertaken, absolutely irrelevant to the recommendation to eliminate four Judges at the Court of Appeals. Nevertheless, the SCAO has chosen, in essence and for undisclosed reasons, to suggest that delay reduction be abandoned.

B. *Delay Reduction Strategy And Techniques*

The SCAO Report makes no mention of the strategy that propelled the Court of Appeals' delay reduction efforts. That strategy was straightforward and involved three prongs. The Court of Appeals' initial effort was aimed at reducing delay in the Judicial Chambers. This was almost immediately successful and Court cut the time in Chambers virtually in half. Remarkably, the Court achieved this result while the Judges and their staffs were taking on additional responsibilities for case processing.

With this achievement to point to, the Court aggressively sought, and with the invaluable assistance of then-Chief Justice Corrigan, temporarily obtained additional funding for Research Division attorneys. Staffing shortages in the Research Division were chiefly responsible for the delay in the Warehouse, where cases simply sat (for 271 days on average in 2001) because there

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[8] SCAO Report, p 54.

[9] The exception relates to the additional Research Division attorneys that the Court was able to hire as a result of legislative action. The Court funded these new hires with additional fee revenue that came to it as part of the comprehensive fee package that then-Chief Justice Corrigan was able to convince the Legislature to pass. Unfortunately, subsequent budget cuts and increases in costs outside the Court's control, primarily in the areas of insurance and retirement, have eliminated the Court's ability to maintain these higher staffing levels.

[10] SCAO Report, p 54. See also *Current And Proposed Case Call Configurations*, SCAO Report, p 56: "In fact, delay reduction in the COA, under its present composition and budget strictures, has reached a point where further reductions in the time it takes to decide an opinion case on appeal are impossible."

were insufficient Research Division attorneys to handle them. Notably, the Court has nonetheless reduced the time in the Warehouse (to 159 days on average at the end of 2006), due in part to the fact that the Judicial Chambers were handling more cases directly.

The third prong of the Court's strategy was to reduce the time in Intake. In July of 2002, the Court of Appeals submitted a number of proposed changes in the court rules that would have shortened various filing deadlines. The Supreme Court has held these proposals in abeyance. The SCAO Report's statement that part of the Court's delay reduction effort was in "shortening various filing deadlines"[11] is inaccurate with respect to these proposed amendments. The Court has *proposed* shortening filing deadlines; the Supreme Court has held these proposals in abeyance. Were these proposals to be adopted, all other things being equal, the average time in Intake would go down considerably and the Court would continue to achieve progress in its delay reduction efforts.

Thus, budgetary constraints—while vitally important with respect to reducing the delay in the Warehouse—do not entirely control the overall delay reduction effort. By their efforts, the Judges have reduced delay in their own Chambers *and* have taken some of the load off the shoulders of the Research Division. Were the Supreme Court to adopt the proposed rule changes, all other things being equal, delay in Intake would decrease and it might still be possible to come very close to reaching the Court's goal of deciding 95% of its cases within 18 months of filing despite the very adverse budget situation.

C. *Clearance Rates; Diminishing Returns*

The SCAO Report makes the commonsense observation that "a court cannot decide more cases than it receives indefinitely."[12] Certainly this is true, but only over the very long run. The Court of Appeals has achieved clearance rates of over 100% since 1993, with the only exception being 1999 when the clearance rate was 99.8%.

The SCAO Report then states that, "There comes a point of diminishing returns in attempting to reduce the time it takes to decide a case on appeal."[13] But the SCAO never states where that point might be. Certainly, the American Bar Association did not see diminishing returns when it set the gold standard of deciding 95% of the cases filed within 18 months of filing with an appellate court. Certainly the Legislature did not see diminishing returns when it adopted the same standard for the Court in the late 1990s. Certainly the Judges of the Court did not see diminishing returns when they unanimously adopted this goal in March of 2002.

Thus, the SCAO once again completely fails to define or explain its terms. The question of when delay reduction becomes counter-productive is a serious one. The ABA, the Legislature, and the Judges of the Court have answered that question: not before the Court decides 95% of its cases in 18 months. The SCAO has walked away from the question entirely.

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[11] SCAO Report, p 54.

[12] SCAO Report, p 54.

[13] SCAO Report, p 54.

Interestingly, the SCAO returns to this theme in its section dealing with current and proposed case call configurations.[14] There the SCAO states, "Even without budget reductions in 2007 and 2008, further delay reductions would be minimal and the cost, in both dollars and variance from traditional 'first case filled – first case decided' principals, would outweigh any gains."[15] There are any number of problems with this sentence:

- As noted above, were the Supreme Court to adopt the Court of Appeals' proposed rule changes, delay in Intake, all other things being equal, would decrease. There would be no cost to the state whatever in taking such action.

- If there were no budget constraints, the Court of Appeals would be fully staffed at its authorized levels. Under such circumstances, there can be little question that the Court of Appeals would reach its delay reduction goals. Indeed, despite such constraints, the Court of Appeals has made surprising progress toward the goals in the second quarter of 2007.

- Once again, the SCAO has failed to define or explain its terms. What costs at the Court of Appeals does the SCAO attribute to delay reduction? What costs does it attribute to an alleged variance from traditional "first-in, first-out" principles? How does the SCAO define "gains" from delay reduction and how does it quantify such gains in dollar terms? There is no hint in the SCAO Report that the SCAO has even considered these questions.

D. "First-In, First-Out"

The SCAO Report makes the extraordinary statement that, "New case management techniques, under the guise of greater efficiency, violate the traditional 'first-in, first-out' order of deciding cases on appeal[.]"[16]

First, note the pejorative nature of the language that the SCAO uses. "Guise" implies some manner of subterfuge. "Violate" implies some type of improper action. Apparently, therefore, the SCAO believes that when the Supreme Court gave priority to interlocutory criminal appeals,[17] child custody cases,[18] interlocutory appeals from the grant of preliminary injunction,[19] appeals from all cases involving election issues,[20] appeals from decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation including in the Michigan Administrative Code, or any other action of the legislative of executive branch of

[14] SCAO Report, pp 56-57.

[15] SCAO Report, p 56.

[16] SCAO Report, p 54.

[17] MCR 7.213(C)(1).

[18] MCR 7.213(C)(2).

[19] MCR 7.213(C)(3).

[20] MCR 7.213(C)(4).

government is invalid,[21] and other cases that the Court of Appeals orders expedited,[22] it was engaging in some type of improper subterfuge.

Obviously, the SCAO cannot believe these things. The point here is that, by court rule, the Court of Appeals has for years departed from a strict adherence to a "first-in, first-out" rule, in certain circumstances and for rather obvious reasons: the Supreme Court has decided that certain classes of cases are of sufficient importance to be advanced to the head of the line, out of the normal "order" of deciding cases on appeal.

As its footnote 14[23] makes clear, the SCAO's real target here is the Court of Appeals' expedited summary disposition docket. In its brief reference to that pilot program, the SCAO neglects to mention that:

- Following the Supreme Court's November 2003 decision to hold the proposed rule changes affecting Intake in abeyance, it directed the Court of Appeals to "develop a plan that is in the best interests of the administration of justice."[24]

- After weeks of intensive study, a joint bench-bar task force, which included Justice Young and Carl Gromek, in a February 2004 public report unanimously recommended that an expedited summary disposition docket be created.

- The Supreme Court accepted this recommendation and authorized the creation of such a docket at the Court on a pilot basis[25] and later authorized the extension of the pilot.[26]

- Most importantly, nowhere in this entire process did anyone ever suggest that "under the guise of greater efficiency" that the Court was violating anything.

As the report of the joint bench-bar task force makes clear, the purpose of the expedited summary disposition docket was to further reduce delay on appeal. Both the task force and the Supreme Court thought that this was of sufficient importance to justify the adoption of a six-month schedule for deciding appeals from trial court summary disposition. Thus, there was a conscious decision to take summary disposition appeals out of the normal "order" of deciding cases.

The program proved to be very popular among litigants (if not so popular among lawyers). As a result, there were a significant number of cases on the expedited docket and many of them were

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[21] MCR 7.213(C)(5).

[22] MCR 7.213(C)(6).

[23] SCAO Report, p 54.

[24] AO No. 2003-6.

[25] AO No. 2004-5.

[26] Amended AO 2004-5.

of greater complexity than the task force anticipated. Upon the Court of Appeals' recommendation, the Supreme Court ultimately suspended the pilot program.

E. *Conclusion*

For reasons that are not readily apparent, the SCAO has chosen to introduce a critique of the Court of Appeals' delay reduction effort into the SCAO Report. Its key points are incorrect, undefined, and irrelevant. Its ultimate sentence, that "[o]ptimal results require the correct allocation of resources[,]" is of course true. But the SCAO never indicates what such optimal results might be or how the Court of Appeals' delay reduction effort was or is in any sense an incorrect allocation of resources. The results that the Court of Appeals has achieved in this effort are, indeed, remarkable and even more remarkably the Court of Appeals has achieved these results without a permanent increase in staffing resources. Rather, the Court of Appeals has achieved great success primarily through managing its *existing* resources. Simply put, the Court of Appeals' Judges and its staff have worked harder and smarter and according to a publicly announced and available plan. The results speak for themselves.

V. Allocation Of Resources

The SCAO Report devotes considerable time to the question of allocation of resources; it contains a section on the present allocation of resources at the Court of Appeals[27] and a section on its proposed reallocation of such resources.[28] Again, the SCAO has gone seriously awry in its analysis:

- The SCAO report asserts that, "Working within the parameters set by its budget and shrinking research division, the COA has been forced to shift more of the preparatory work on opinion cases to the judicial chambers."[29] This is again inaccurate. The decision to route complex cases directly to the Judicial Chambers was made in 1997 when Justice Corrigan was Chief Judge of the Court and Carl Gromek was its research director. At that time the Research Division was apparently "cherry picking" cases, and the more complex cases were being unreasonably delayed. To remedy this problem, in December 1997, the Judges of the Court *chose* on a voluntary basis to take on, beginning in 1998, the additional tasl of working up bench memos for complex cases. The continuation of complex panels beyond 1998 was voted on at a December 1998 Judges' meeting. At that time, Mr. Gromek stated that the complex panel concept was absolutely necessary in 1998 because the Research Division was unable to meet case call demands. He then stated that the situation no longer existed. Nevertheless, a majority of Judges then voted to continue the use of complex case call panels.[30] By Mr. Gromek's own words, this choice was unrelated to the budgetary situation at the time.

[27] SCAO Report, pp 54-55.

[28] SCAO Report, pp 55-56.

[29] SCAO Report, p 54.

[30] December 1998 Judge's Meeting minutes, p 4.

- The SCAO Report now labels complex panels as "inefficient."[31] It never explains why using young and relatively inexperienced pre-hearing attorneys to work up the most difficult cases that the Court decides is an "efficient" use of resources. But it assumes that these attorneys will, under its proposed configuration, perform just such a function.[32]

- Further, complex panel decisions are published with a greater frequency than the overall publication rate for decisions by the Court of Appeals. The publication rate for complex panels is roughly 18%; the publication rate for all decisions is 7.8%.

- In addition, the Judges of the Court, as part of its delay reduction plan, *chose* in 2002 to take on a "no report" case as part of each regular case call. This decision preceded the truly serious budget problems that the Court has experienced in the last several years.

VI. Implementation

As noted above, the only reference in the SCAO Report to implementation is that the elimination of the four judgeships would be accomplished by "attrition."[33] There is no discussion whatsoever of how four vacancies might occur roughly simultaneously in each of the Court's judicial districts so that there might be an orderly transition from a court of 28 Judges to a court of 24 Judges. Nor is there any indication as to when such a transition might occur. One might reasonably expect that, since any such reduction would have to be conducted pursuant to legislative action in form of statutory change, a draft of the proposed legislation would accompany the recommendation. There is no such draft in the SCAO Report. Thus, the SCAO has completely avoided the constitutional problem inherent in legislation *reducing* the number of Judges on the Court of Appeals.[34]

VII. Budgetary Matters

The SCAO Report anticipates savings of approximately $1,434,088 annually as a result of the elimination of the four judgeships.[35] Of this, $770,000 would be reallocated to the Research Division to enable it to hire 11 additional pre-hearing attorneys.[36] The remaining $644,088 would somehow be used to "save taxpayer dollars."[37]

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[31] SCAO Report, p 57.

[32] See SCAO Report, p 55 referring to 11.28 "prehearing attorneys" whose work is now being done in the Judicial Chambers.

[33] SCAO Report, p 57.

[34] Const 1963, art 6, § 8.

[35] SCAO Report, p 56.

[36] SCAO Report, p 56.

[37] SCAO Report, p 57.

Dealing with the last proposition first, anyone who has observed the budgetary process in Michigan in recent years recognizes that revenues flowing into the state treasury have been used (1) to fund existing or new governmental programs, (2) in times of surplus, to fund the budget stabilization fund, or (3) in the 1990s, to reduce taxes.

The state is now in a time of significant budget crisis. Thus, those revenues that do flow into the state treasury will not be used to fund the budget stabilization fund or to reduce taxes. Indeed, the Governor and the Legislature are giving serious consideration to *raising* taxes.

Thus, the $644,088 of unallocated "savings" from the elimination of four judgeships at the Court will not, under current circumstances, be returned to the taxpayers. Rather, these "savings" will in some fashion be reallocated to existing or new governmental programs. Thus, the implicit—but never stated—implication of the SCAO's recommendation is that the work of the Court of Appeals is less important than whatever might be accomplished by these unnamed programs. This implication is completely without support in the SCAO Report or, for that matter, anywhere else.

Further, the notion that $770,000 of "savings" will be returned to the Court to allow it to hire 11 additional pre-hearing attorneys represents the triumph of hope over experience. One need look no further than recent actions with respect to the FY 2008 savings from the voluntary relinquishment of state vehicles by the Judges of the Court of Appeals and the Justices of the Supreme Court. Within weeks, those savings had been allocated by the Senate, in a bi-partisan vote, to the funding of a mental health court program, a program that has not been statutorily authorized in Michigan.

Even assuming that an understanding—the more colloquial term is "deal"—might be reached with the Governor and the Legislature as to the return of this $770,000 to the Court, this understanding would, by its very nature, be ephemeral. One of the oldest axioms of the budgetary process is that one Legislature cannot bind another.[38] Thus, any understanding with the current Legislature would not bind the next. Further, in an era of term limits, such an understanding would, as a practical matter, evaporate within a matter of a few short years. To proceed with the elimination of the four judgeships on this basis would, therefore, be an act of almost willful naïveté.

VIII. Fee Increases

There are, of course, other methods of increasing the resources available in the Research Division without additional costs to the taxpayers. One such method is by increasing the fees to litigants. H.B. 4501, which the House Appropriation Committee has reported out with a favorable recommendation, would increase the fees that the Court of Appeals is authorized to

[38] *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660; 698 NW2d 350 (2005) ("Therefore a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature."). See also *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002).

pass and authorize a new fee. The Court of Appeals' staff estimates that the aggregate revenue increase from these increased fees would be approximately $270,500. At a total cost of $70,000 per new pre-hearing attorney, this would allow the hiring of approximately four such attorneys, assuming varying start dates. Chief Justice Taylor and the staff of the Supreme Court have, however, opposed such fee increases.

There is no question that, as a matter of public policy, the taxpayers of Michigan should contribute to funding the operations of the Court of Appeals. The prompt and reasoned resolution of appeals from trial court decisions is undisputedly a public benefit. However, how *much* the taxpayers should contribute should be open to discussion. Currently, the ratio between GF/GP funds and revenues from fees is approximately 90/10. Shifting that ratio somewhat to the fee side will, if GF/GP appropriations are not reduced as an offset, achieve the goal of increasing staffing in the Research Division without reducing the number of Judges at the Court of Appeals.

IX. Fewer Judges, Less Work

Adoption of the recommendations of the SCAO Report will, in the simplest terms, result in fewer Judges at the Court of Appeals doing less work. In the name of "efficiency" the SCAO apparently has assumed that this is a desirable result and a public good. It is neither. Judges at the Court of Appeals are appointed or elected to carry out the responsibilities of their offices. When taken to their ultimate absurdity, the recommendations of the SCAO Report would result in a small number of Judges at the Court of Appeals functioning simply as appendages of the Research Division.

It is certainly true that the relationship between the Judges of appellate courts and their lawyer support staff has been the subject of considerable controversy over the years.[39] This is a serious issue and it deserves serious consideration. It should not be decided on the basis of a report such as the one the SCAO has prepared and presented to the Supreme Court. To do so would be a disservice to the citizens of this state in general and to the judiciary in particular.

[39] See, for example, Mary Lou Stow and Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet*?, 75 Judicature 216 (1972). But see also David J. Brown, *Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth*, 75 Judicature 291 (1992).